Additional Views to Accompany
H.R. 3266, "Faster and Smarter Funding for
First Responders Act of 2003"

These views note concerns with H.R. 3266 as amended by the Nadler amendment authorizing the Federal Government to enter into and execute security enhancement and technical assistance contracts – including security enhancements in the form of improvement upon real property – for the direct benefit of buildings used for worship or sectarian service or instruction. While it is conceded that the purpose of the amendment is to protect high-risk non-profit organizations, the part of the provision which authorizes the government to provide funds directly for the purpose of improvements or enhancements of places used for worship appears to be in violation of the Constitution.

The Supreme Court has repeatedly held that no government funds can be used to maintain, restore, or make capital improvements to physical structures that are used as houses of worship, even if religious services are infrequent. This amendment, therefore, runs contrary to what is allowed under the Constitution and our First Amendment jurisprudence. The amendment empowers the Secretary of the Department of Homeland Security to provide government money towards "the purchase and installation of security equipment in real property (including buildings and improvements), owned or leased by a nonprofit organization," an act that is clearly unconstitutional to the extent that it applies to houses of worship or buildings used for sectarian instruction.

Three Supreme Court decisions make clear that it is unconstitutional to allocate federal grants for the repair or preservation of structures devoted to worship or religious instruction, and all three decisions remain binding law. In Tilton v. Richardson, 403 U.S. 672 (1971), the Court laid the framework for the current constitutional requirements regarding construction, upkeep, and maintenance of religious institutions' physical facilities. Tilton involved a challenge to the constitutionality of a federal law under which federal funds were used by secular and religious institutions of higher education for the construction of libraries and other campus buildings. While the law allowed money to go to religious institutions, it also contained a proviso that expressly forbid funds from being used on buildings that would be used for worship or sectarian instruction. The Court upheld the program, but it unanimously held that the proviso was constitutionally necessary and unanimously invalidated part of the statute that would have allowed religious schools to convert the federally-funded facilities for worship or sectarian instruction after twenty years had passed. The Court made clear that no building that was built with federal funds can ever be used for worship or sectarian instruction. 403 U.S. at 692.

In two subsequent cases decided two years later, the Supreme Court clearly reaffirmed the principle that the First Amendment prohibits the government from subsidizing the construction or repair of buildings used as houses of worship. In Hunt v. McNair, 413 U.S. 734 (1973), the Supreme Court upheld the South Carolina Educational Facilities Authority Act, which established an "Educational Facilities Authority," through which educational facilities could borrow money for use in their facilities at favorable interest rates. However, the Act required each lease agreement to contain a clauses forbidding religious use in such facilities and allowing inspections

to enforce that requirement. 413 U.S. at 744. The Court upheld the Act, including the condition that government-funded bond financed physical structures could never be used for religious worship or instruction.

Finally, in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), the Supreme Court struck down New York's program of providing grants to nonpublic schools for use of maintenance and repair of "school facilities and equipment to ensure health, welfare, and safety of enrolled students." 413 U.S. at 762. The Court summarized its previous holdings as "simply recogniz[ing] that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one." Id. at 775. The Court then held that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." Id. at 777. In other words, government funding for either the construction or maintenance and repair of physical structures is unconstitutional if there is any possibility that the structures will be used for sectarian worship or instruction. Otherwise the government would be subsidizing religious activity.

Thus, under Tilton, McNair, and Nyquist, it would be unconstitutional for the federal government to enter into and execute security enhancement and technical assistance contracts that will augment any buildings used by non-profit organizations for worship or religious instruction. All three of these cases firmly establish that it is constitutionally impermissible for the government to provide aid for the construction, repair, or maintenance of any buildings that are, or might be, used for religious purposes, even when the underlying purpose is to enhance homeland security.

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